> argued that interactions between the subsidiary and affiliated entities should be the same as those between the parent and other third parties or nonaffiliated entities. In certain situations this type of relationship may be warranted, but we are not prepared to adopt this standard for all intercorporate transactions between the subsidiary and affiliates. AT&T and GTE are vertically integrated corporations. To the extent there may be efficiencies within their structures they should not be precluded from capitalizing on them where countervailing regulatory considerations do not demand stringent separation. Accordingly, in addressing the appropriate degree of separation we take care to address those regulatory concerns where sole reliance on accounting is an appropriate safeguard against potential anticompetitive behavior.[54]

The Commission shouldundertake a similar cost/benefit analysis here. If it does, it will necessarily conclude that neither the Act nor public policy considerations preclude a BOC and its affiliate from sharing administrative functions.

IV. MARKETING PROVISIONS OF SECTIONS 271 AND 272

Section VI of the Notice seeks comment on provisions of the 1996 Act relating to the marketing or selling of local exchange and interLATA services. Ameritech addresses those issues below.

A. Section 271(g)(1)

The Commission asks, first, whether any regulations are necessary to implement section 272(g)(1), which provides that "[a] Bell operating company affiliate required by this section may not market or sell telephone exchange

54 Amendment of Section 64.702 of the Commission's Rules and Regulations, Final Decision, 77 FCC 2d. 384, 476 (1980).

services provided by the Bell operating company unless that company permits other entities offering the same or similar service to market and sell its telephone exchange services." This provision is clear on its face; Thus, implementing regulations are not necessary. Section 272(g)(1) and/or section 272(e) clearly permit an affiliate of a BOC to market, sell or resell the BOC's telephone exchange service. If the affiliate resells such services, it must do so at the same wholesale rate on which these services are made available to other, unaffiliated carriers.[55]

A. Sections 271(e) And 272(g)(2)

Section 271(e) of the 1996 Act prohibits certain interexchange carriers from jointly marketing interLATA services with resold local exchange services obtained from a BOC until that BOC has received interLATA authority, or 36 months have passed from the date of enactment.[56] Section 272(g)(2) provides that a BOC may not "market or sell" interLATA service provided by a section 272 affiliate within any of its in-region states until such company is authorized to provide interLATA services in such state. Asserting that these two provisions "appear to be parallel provisions that are intended to prevent BOCs and the largest interexchange carriers from marketing local and long distance services

55 See section 272(e)(3), which provides that a BOC and an affiliate subject to section 251(c) "shall charge [its section 272 affiliate], or impute to itself (if using the access for its provision of its own services), an amount for access to its telephone exchange service and exchange access that is no less than the amount charged to any unaffiliated interexchange carriers for such service[.]"

56 Section 271(e) provides: "[u]ntil a Bell operating company is authorized . . . to provide interLATA services in an in-region State, or until 36 months have passed since the date of enactment, whichever is earlier, a telecommunications carrier that serves greater than 5 percent of the Nation's presubscribed lines may not jointly market in such State telephone exchange service obtained from such company pursuant to section 251(c)(4) with interLATA services offered by that telecommunications carrier."

jointly prior to the BOCs' entry into in-region interLATA service," the Commission tentatively concludes that the terms "market or sell" in section 272(g)(2) should be construed similarly to the term "jointly market" in section 271(e).

Ameritech disagrees with the Commission's tentative conclusion. While the Commission may be correct that section 272(g)(2) and 271(e) are "parallel" provisions in certain respects, they are not identical in scope. Section 271(e) limits the ability of certain interexchange carriers to "jointly market" resold local exchange service and interLATA services. It does not, however, prohibit interexchange carriers from selling local exchange services on a stand-alone basis during the period in which the joint marketing restriction applies. In contrast, Section 272(g)(2) prohibits the BOCs not only from joint marketing interLATA services, but also from selling them on a stand alone basis prior to the time they receive interLATA authority. (Hence the reference to market "or sell," in contrast to section 271(e), which speaks only of joint marketing.) Because section 272(g)(2) is broader in its application than section 271(e), the Commission's tentative conclusion that they are identical in scope and that jointly market should be construed to mean market or sell is incorrect.

The difference between "joint marketing" and "sales" is further underscored by section 272(g)(3) of the 1996 Act. That section refers to "[t]he joint marketing and sale of services permitted under this subsection." If the term "joint marketing" were construed to mean "market or sell," the reference to the "sale" of services in section 272(g)(3) would be completely superfluous. This would be contrary to the principle of statutory construction, cited in paragraph

57 of the Notice, that a statute should be interpreted so as to give effect to each of its provisions.

Accordingly, the Commission should reject its tentative conclusion that the term "market or sell" means jointly market. Instead, the Commission should hold that the terms have different meanings: that one may be "selling" a product even if one is not jointly marketing that product with other products, and that one may be jointly marketing a product even if one does not complete a sale.

The Commission should also clarify the scope of the term joint marketing in a manner consistent with this distinction. For example, the Commission should clarify that jointly advertising two products would be joint marketing, regardless of whether a sale takes place. Indeed, insofar as advertising is one of the quintessential means by which a business markets its products, a contrary holding would completely undermine the intent of section 271(e).

Likewise, providing bundled discount packages for the purchase of local and long distance services represents a clear case of joint marketing. Since the whole point of providing a bundled discount is to induce customers to purchase both products together, it would be difficult to characterize bundled discounts as anything other than a joint marketing activity.

In addition, the Commission should find that making local and long-distance services available from a single source constitutes joint marketing. While theoretically a company could provide a single source of contact for local and long-distance services without violating the joint marketing prohibition, it would require, at a minimum, careful training of sales personnel and other safeguards. Ameritech does not believe that such training and safeguards could or would be implemented effectively during the relatively brief interim period in which the joint marketing restriction applies. As a result, a single point of contact for local and long-distance services would be a prescription for rampant joint marketing violations. Moreover, by the time these violations were discovered, reported, and litigated, the damage could be considerable and irreversible. The Commission should not invite widescale section 271(e) violations by permitting the three largest interexchange carriers, which are the only entities subject to section 271(e) joint marketing restrictions, to sell local and long-distance services from a single source.

Finally, the Commission should clarify that carriers subject to section 271(e) restrictions on joint marketing may not engage in joint marketing of any services purchased under section 251(c)(4), even if that carrier is also providing, or seeks to provide, the same service through the purchase of unbundled network elements. This clarification is necessary to prevent such carriers from evading the intent of this restriction. As the Commission recognizes, section 271(e) is "intended to prevent BOCs and the largest interexchange carriers from marketing local and long distance services jointly prior to the BOCs' entry into in-region interLATA service, if the interexchange carrier is purchasing incumbent LEC services pursuant to section 251(c)(4) for resale."[57] Interexchange carriers may, however, serve some customers through the purchase of network elements and others through resale of LEC services. If those carriers are permitted to jointly market services to the customers served by unbundled network elements through, for example, mass marketing techniques, they would necessarily also be

57 Notice at para. 91.

engaging in joint marketing to customers in that same media market who are receiving resold LEC services. Indeed, they could completely evade the intent of section 271(e) by serving just one customer through the purchase of unbundled elements and the rest through resale. Surely Congress did not countenance such a result. Therefore, the Commission should clarify that interexchange carriers subject to section 271(e) may jointly market local and long-distance services only to the extent their joint marketing campaign does not reach any customers to whom they provide resold local exchange services.

B. Terms Under Which BOCs May Market And Sell The InterLATA Services Of Their Affiliate

Noting that section 272(b)(3) requires that BOCs and their affiliates maintain separate employees, and that section 272(b)(5) requires that transactions between BOCs and their affiliates be conducted at arms length, the Commission also asks for comment on the corporate and financial arrangements under which a BOC may market and sell interLATA services provided by its affiliate. The Commission asks, in particular, whether joint marketing services would have to be subcontracted to an outside entity, or whether, alternatively, the affiliate must purchase marketing services from the BOC on an arm's length basis.

Ameritech strongly opposes any requirement that joint marketing services be subcontracted to outside entities. Any such requirement would be at odds with the plain meaning of section 272 and sound public policy. Section 272(b)(3) requires that BOCs and their long-distance affiliates maintain separate employees. It does not, however, prohibit BOC employees from performing services on behalf of the subsidiary. On the contrary, section 272(b)(5) specifically contemplates that the BOCs <u>will</u> provide services for their affiliates and vice versa. By establishing the terms under which such services may be provided -- i.e., pursuant to arm's length contracts -- section 272(b)(5) manifests Congress' intent and expectation that those services would be provided. There is certainly no basis for concluding that joint marketing services are somehow outside the purview of this provision, which, by its terms, applies to all transactions.

The premise of the Commission's inquiry into whether joint marketing services must be subcontracted to a third party is the notion that one who markets or sells the services of a BOC affiliate is necessarily an employee of the BOC affiliate.[58] That premise is fatally flawed. There are numerous contexts, even in the telecommunications industry, in which the employees of one company sell the services of another company. For example, customer premises equipment (CPE) vendors sell BOC services in order to satisfy the demand of customers for one-stop shopping. Indeed, the Commission required the BOCs to establish sales agency programs to compensate unaffiliated CPE vendors for the costs they incur in selling BOC services. The fact that CPE vendors sell BOC services does not make them BOC employees. On the contrary, , they sell BOC services in order to enhance their own CPE sales. Likewise, many cellular phone vendors sell cellular services as agent for a cellular provider. Just as no one could argue that these vendors are employees of the provider whose services they are selling, no one could seriously contend that BOC personnel who sell or market the services of their affiliate are employees of the affiliate.

58 Notice at para. 92.

Requiring the BOCs to subcontract joint marketing services would also be contrary to sound public policy. First, it would place the BOCs at a significant disadvantage vis-a-vis other telecommunications carriers. The BOCs' competitors, including the much larger AT&T, would be permitted to provide marketing services on an integrated basis, while the BOCs would be forced to maintain two sales forces: an in-house sales force providing local exchange services only and an outside sales force providing integrated services. This redundant outside sales force would not only unnecessarily increase BOC marketing costs, but also deny BOCs the benefit of the expertise they have acquired in designing and marketing network solutions to meet customers' needs. Indeed, one of the principal anticipated benefits of BOC entry into long-distance services is that BOCs have the experience and knowledge to be formidable competitors in long-distance services. That is why it is expected that BOC entry into the market will give a significant, needed boost to competition. Adopting an overly expansive definition of the term "employee" that adds unnecessarily to BOC marketing costs and prevents them from tapping into the expertise and experience of their employees, would deny the public the full competitive benefits that BOC entry could bring. This would not only be bad statutory interpretation, it would be bad public policy.

While Ameritech thus strongly opposes any requirement that the BOCs subcontract joint marketing services, it agrees that, consistent with section 272(b)(5), a BOC may only perform such services on behalf of its affiliate pursuant to the terms of an arm's length contract. Such arm's length contracts should be compensatory as negotiated between the parties, or in accordance with accounting rules that may be promulgated by the Commission in the Accounting Safeguards proceeding.[59]

V. NONDISCRIMINATION SAFEGUARDS

A. Rules Implementing Sections 272(c)(1) And 272(e)

Noting that sections 201 and 202 of the Communications Act prohibit, respectively, unjust and unreasonable practices and unjust and unreasonable discrimination, the Commission seeks comment on the relationship between these provisions and sections 272(c)(1) and 272(e). The Commission asks, in particular, whether any non-accounting nondiscrimination rules are necessary to implement these latter two provisions.

Ameritech does not believe that specific rules are necessary to implement sections 272(c)(1) and 272(e) or that specific rules would serve the public interest. Claims of discrimination could be raised in a variety of contexts, each involving circumstances and considerations that distinguish the claim from other claims. No single rule could anticipate and accommodate these varying circumstances. Therefore, rather than limiting itself with a one-size fits all rule, the Commission should give itself the flexibility to address future claims of discrimination based on the merits of each claim. In that way, the rules will be established with the benefit of a factual record, not in a vacuum. This is, in fact, the approach the Commission took in implementing sections 201 and 202 of the Act, and Ameritech believes that approach has served the Commission well.

59 Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996, CC Docket No. 96-150, FCC 96-309, released July 18, 1996.

If the Commission does adopt rules implementing section 272(c)(1) and 272(e), those rules should be general in nature. For example, the Commission could clarify that section 272(e) applies specifically to discrimination in the provision of interconnection by an incumbent LEC. This limitation, which is implicit in the language of the provision itself, is made clear in the legislative history of section 272(e). Specifically, the Joint Explanatory Statement notes that section 252(f) of S. 652 (from which section 272(e) derives) was "intended to reduce litigation by establishing in advance the standard to which a Bell operating company entity that provides telephone exchange service or exchange access service must comply in providing interconnection to an unaffiliated entity."[60] The Commission should construe section 272(e) with reference to this purpose.

In paragraph 67 of the Notice, the Commission asks "whether the terms of section 272(c)(1) and (e) could be construed to require a BOC to provide a requesting entity with a functional outcome identical to that provided to its affiliate even if this would require the BOC to provide goods, facilities, services, or information to the requesting entity that are different from those provided to the BOC affiliate." The answer to this question is no. BOCs need to provide the same "service," "function," "information," and "goods," and at the same quality, to unaffiliated telecommunications carriers that the BOC provides to its section 272 affiliate. That, however, does not necessarily mean that the provision of such service, etc. will result in the same functional outcomes.

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60 Joint Explanatory Statement at 150.

The prohibition on discrimination in the Act has always been construed to apply only to "like services."[61] "[L]ikeness . . . turns upon the 'functional equivalency' test, which 'focuses on whether the services in question are 'different in any material functional respect.'"[62] The fact that different customers may have different needs or different networks and thereby require different services in order to obtain the same functional outcome has never been deemed a basis for finding that those services are "like."[63]

Indeed, the Commission has construed the "likeness" test strictly, finding even minor differences sufficient to render two services not like. For example, in the Tariff 12 proceeding, the Commission held that an integrated package of services provided by AT&T was not "like" its component piece-parts, purchased individually.[64] The United States Court of Appeals for the District of Columbia Circuit upheld this decision on the ground that customers purchasing integrated packages did not have as much control over the manner in which their service was provisioned by AT&T as customers purchasing those same services individually.[65] Surely if this difference is sufficient to render services that are otherwise identical not "like," the Commission could not possibly find that two distinct and different services are like simply because they produce a

61 See, e.g. The Competitive Telecommunications Association v. FCC, 998 F.2d 1058 (D.C. Cir. 1993)

62 MCI Telecommunications Corp. v. FCC, 917 F.2d 30, 39 (D.C. Cir. 1990); American Broadcasting Companies, Inc. v. FCC, 663 F.2d 133 (D. C. Cir. 1980).

63 The fact that section 272 does not explicitly qualify the nondiscrimination prohibition with a "just and reasonable" standard, as does section 202, is irrelevant. The "likeness" test addresses whether there is discrimination, not whether such discrimination is just and reasonable.

64 AT&T Communications, Revisions to Tariff FCC No. 12, 6 FCC Rcd 7039 (1991).

65 Comptel v. FCC, supra.

functionally similar result in two different networks. The test is not whether they produce the same result in different networks; it is whether they produce the same result in the same network.

Even though section 272 is not a vehicle by which customers may force a BOC to provide goods, facilities, services, or information that are actually different from what the BOC is already providing to itself or others, customers are not without other options in this regard. In particular, Section 251 requires incumbent LECs to provide interconnection and access to network elements on request at any technically feasible point. Thus, if a customer seeks interconnection or access to an unbundled element on terms that are different from what a LEC is already making available, the LEC would be obligated to provide the type of interconnection or network element requested if technically feasible to do so.

B. Transfers of Network Capabilities

In paragraphs 70 and 79 of the Notice, the Commission expresses concern that a BOC might seek to evade the nondiscrimination requirements of the 1996 Act by transferring its network capabilities to an affiliate. The Commission proposes to address this concern by adopting two rules: First, noting that section 272(a) requires any BOC affiliate that is a local exchange carrier subject to section 251(c) to be separate from the BOC's section 272 affiliate, the Commission tentatively concludes that any transfer by a BOC of existing network capabilities of its local exchange entity to its section 272 affiliate is prohibited by section 272(a).[66] Second, noting that the Act defines a BOC as including a BOC's

66 Notice at para. 70.

"successor or assign," the Commission asks whether it may treat any affiliate to which a BOC transfers its existing local exchange network capabilities as a "successor or assign" of the BOC to which section 272(a), 272(c), and 272(e) would apply.

In responding to these proposals, Ameritech notes, at the outset, that they are extremely vague and, on their face, at least, overbroad. In particular, the Commission does not clarify exactly what it means by "network capabilities" and what types of transfers would therefore be encompassed within its proposed rules. Ameritech believes that the statute provides clear guidance on these points, as discussed below.

(1) Transfer of local exchange capabilities to 272 affiliate

Under section 272(a) a BOC and any BOC affiliate that is subject to the requirements of section 251(c) must be separate from the section 272 affiliate. The Act defines a BOC as including a BOC's successor or assign, but otherwise not including the BOC's affiliates.[67] Thus, an affiliate of the BOC would be subject to section 272(a) separation requirements under two circumstances only: (1) if the affiliate was found to be subject to section 251(c); or (2) if the affiliate was a "successor or assign" of the BOC.

Section 251(c) applies to "incumbent local exchange carriers" or "carriers designated by the Commission as 'comparable.'" Clearly, a section 272 affiliate established to provide, inter alia, interexchange interLATA services is not an

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67 Section 153(4)(B) and (C).

incumbent local exchange carrier. There are, however, circumstances in which a section 272 affiliate could be deemed a "comparable" carrier. Section 252(h)(2) defines those circumstances. Under that section, the Commission is permitted to treat a local exchange carrier as an incumbent carrier if: "(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to [the incumbent LEC]; (B) such carrier has substantially replaced an incumbent local exchange carrier . . . ; and (C) such treatment is consistent with the public, interest, convenience, and necessity and the purposes of [section 251]." Thus, if by virtue of a transfer of network capabilities to an affiliate by a BOC, the affiliate meets the three-pronged test outlined above, the affiliate could be required to comply with the interconnection provisions in section 251(c).[68] In that case, the affiliate would have to be separate from any section 272 affiliate.

The other statutory basis for finding that an affiliate must be separate from a section 272 affiliate would be if the affiliate was a "successor or assign" of the BOC. The term "successor or assign" is not defined in the Act or its legislative history. The term is commonly understood and widely used, however, to refer to a "continuing business enterprise" that takes the place of another entity through, typically, a transfer of assets or title.[69]

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68 In paragraph 79 of the Notice, the Commission states: "[I]f a BOC affiliate is engaged in local exchange activities and is therefore subject to section 251(c), then the local exchange affiliate would be subject to 272(c) requirements . . . " If the Commission means by this that any BOC affiliate that is engaged in any local exchange activities is subject to section 251(c), the Commission is clearly wrong. There is nothing in the Act to support this view. Section 251(c) applies only to incumbent LECs and to those who meet the requirements of section 251(h). A BOC affiliate engaged in local exchange activities is not necessarily either. Certainly if an affiliate provides local exchange service by reselling the BOCs' local exchange service or through its own, facilities, independent of the BOC's facilities, it is not subject to section 251(c). The Commission should correct any misimpression it may have created by this language.

69 See, e.g., Golden State Bottling Co. v. NLRB, 414 U.S. 168, at 178-79 (1973). See also Response of the United States in Opposition to AirTouch's Motion for Declaratory Ruling that it

The term "successor or assign" was part of the Modification of Final Judgment (MFJ). In particular, section 3 of the MFJ provided that the terms of the decree were binding on, inter alia, the BOCs' affiliates, successors and assigns. In the years following the MFJ, the BOCs have routinely sold entire local exchanges to independent telephone companies. It has never been suggested that those sales rendered those independent telephone companies "successors or assigns" of a BOC.

More recently, the meaning of the term "successor or assign" was raised in the context of the spin-off by Pacific Telesis of its cellular subsidiary, AirTouch. While the MFJ court never decided whether the divested company constituted a successor or assign of Pacific Telesis' affiliate, the brief submitted by the Department of Justice on the matter is instructive. In its brief, the Department argued that the divested company should be considered a successor or assign of the affiliate because Pacific Telesis had spun off its entire cellular business and that business continued to operate in tact.[70] In making this argument, the Department conceded that "most transferees of BOC assets would not be successors to the BOCs for purposes of the decree."[71]

Under the circumstances, the Commission is not free to find that any transfer of network capabilities to a competitive affiliate would qualify that

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is not Subject to the Decree, Civil Action No. 82-0192, March 13, 1995 at 16 ("The decree does not define the term "successors," but general usage is an accepted aid to construction[.] . . . The term 'successor' generally refers to one who takes the place of another and retains the same rights, obligations and property."

70 Id.

71 Id. at 31.

affiliate as a "successor or assign" of the BOC. At a minimum, the new entity would have to substantially take the place of the BOC in the operation of one of the BOC's core businesses.

This is a far more difficult test to meet than the section 251(h)(2) test for "comparable carriers," since, for example, comparable carrier status can be conferred with respect to any "area." Thus, from a practical standpoint, the issue of whether a transfer of network capabilities to a section 272 affiliate would render that affiliate a successor or assign of the BOC is irrelevant to determining whether that transfer may take place. The determinative factor will be whether the transfer would confer section 251(c) status on the affiliate. To the extent that the Commission suggests otherwise -- in particular, that <u>any</u> transfer of network capabilities is prohibited -- it should revise or clarify its tentative conclusions so that they are consistent with the law.

(2) Application of Nondiscrimination Provisions to Affiliate to Which BOC Transfers Network Capabilities

The other issue raised by the Commission with respect to the transfer of BOC network capabilities is the extent to which any affiliate to which such transfer is made would be subject to sections 272(c) and 272(e) nondiscrimination requirements. Section 272(e) applies to a BOC and any BOC affiliate subject to section 251(c). Section 272(c), on the other hand, applies only to a BOC. Attempting to gloss over this difference, the Commission tentatively concludes that if a BOC affiliate is subject to section 251(c), that affiliate would also be subject to 272(c).

This tentative conclusion is at odds with the plain wording of the statute. As noted, unlike sections 272(a) and (e), section 272(c) does not apply to BOC affiliates that are subject to section 251(c); it only applies to the BOC itself. Therefore, section 272(c) could be applied to a BOC affiliate only if that affiliate was a "successor or assign" of a BOC.

The Commission seems to assume that if an affiliate is subject to section 251(c), it would necessarily be a successor or assign of a BOC. This assumption, however, is flawed. As noted above, there are many contexts in which an affiliate of a BOC might be subject to section 251(c) without being a successor or assign of a BOC. For example, an affiliate that acquired local exchange assets from an entity other than the BOC could not possibly be deemed a "successor or assign" of the BOC regardless of whether it had been made subject to section 251(c). Likewise, if a BOC transferred a single local exchange to an affiliate, that affiliate might well be deemed an incumbent LEC in that exchange, but under clear MFJ precedent, it would not be a successor or assign of the BOC. Thus, the Commission's tentative conclusion that section 272(c) necessarily applies to any BOC affiliate subject to section 251(c) is wrong. Rather, it is only sections 272(a) and 272(e) that would apply, along with section 202.

In paragraph 71, the FCC asks whether section 202 would provide adequate protection against discrimination by an affiliate providing interLATA telecommunications services to which a BOC transferred local exchange capabilities in the event section 272(c) did not apply to that affiliate. Ameritech believes that it clearly would. For 62 years, section 202 has been the sole statutory basis for addressing claims of discrimination in the provision of common carrier telecommunications services. Ameritech is not aware of any suggestions by the Commission or anyone else that this provision lacks teeth. On the contrary, the Commission has at times struggled to escape the rigidity of the provision in the face of emerging competition.[72] There is no reason, therefore, why the Commission should question whether section 202 provides sufficient protection against discrimination by common carriers, particularly as applied to an affiliate of a BOC that, by definition, does not qualify as a successor or assign of the BOC (since in that case section 272(c) would also apply).[73]

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72 See, e.g. AT&T Communications, Revisions to Tariff FCC No. 12, 6 FCC Rcd 7039 (1991). See also Competition in the Interstate, Interexchange Marketplace, Notice of Proposed Rulemaking, 5 FCC Rcd 2627 (1990) at para. 131: "Notwithstanding the apparent benefits of contract carriage, there is some question as to whether [section 202 of] the Act permits common carriers to provide telecommunications services on a contractual basis."

73 Noting that information service and manufacturing affiliates are not common carriers and are, therefore, not subject to section 202, the Commission asks whether additional nondiscrimination obligations should be imposed on them in the event a BOC transfers network capabilities to such entities. However, if the BOC transfers local exchange capabilities to its unregulated affiliates and those affiliates thereby begin providing local exchange service, they will become subject to section 202 in their provision of local exchange services. Therefore, the Commission's apparent premise -- that these affiliates would escape the reach of section 202 in their provision of common carrier services -- is wrong. On the other hand, if the Commission means to suggest that unregulated affiliates should be subject to nondiscrimination requirements in their provision of unregulated services, Ameritech submits that this would represent an unwarranted, unjustified departure from at least of fifteen years of regulatory policy, beginning with the Computer II decision. It would also be inconsistent with the Act, which imposes no nondiscrimination obligations on nonregulated affiliates in their provision of nonregulated services. In addition, such a policy could not be reconciled with Congress' stated intent to establish a deregulatory national framework.

VI. ACTIVITIES SUBJECT TO SECTION 272 REQUIREMENTS

In paragraph 33, the Commission reaches the tentative conclusion that a BOC may conduct all of its manufacturing activities, interLATA telecommunications services and InterLATA information services out of a single affiliate. Ameritech agrees. All that section 272(a) of the Act requires is that these activities be provided through "one or more affiliates" that are separate from the BOC. (emphasis added) The reference to "one" affiliate shows that Congress intended to allow all these activities to be in a single affiliate as long as it is separate from the BOC.

In paragraphs 34, 38 and 39, the Commission inquires about the treatment of "previously authorized activities" under sections 271(f), 272(a)(2)(B)(iii) and 272(h). Section 271(f) provides that nothing in section 271(a) or in section 273 prohibits a BOC or affiliate from engaging in activity "to the extent authorized by, and subject to the terms and conditions" contained in an order of the MFJ Court. The above-quoted language establishes that if the MFJ Court determined that the BOC could engage in a waivered activity without a separate affiliate requirement, that authority granted to the BOC continues under the Act.[74]

The last sentence in section 271(f) provides that "[n]othing in this subsection shall be construed to limit, or to impose terms or conditions on, an activity in which a Bell operating company is otherwise authorized to engage under any other provision of this section" (emphasis added). This means that if

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74 Not only did some waivers allow an activity to be provided by the BOC, at least one waiver required that an information service must be provided by the BOC. See United_States v. Western Elec. Co., No. 82_0192 (D.D.C., February 6, 1989) (waiver granted for Ameritech's provision of Customer Name and Address service, a reverse directory service).

the MFJ Court imposed a separate subsidiary requirement on an activity for which it granted a waiver but the Act allows a BOC to engage in that activity on an integrated basis, "the terms and conditions" imposed by the Court (i.e., a separate subsidiary requirement) are not imposed by the Act. A contrary result would violate the language contained in the last sentence of section 271(f) because it would constitute "limit[ing]" and imposing additional "terms and conditions" on an activity which the Act authorizes the BOC to engage in directly.

Section 272(a)(2)(B)(iii) specifically applies section 271(f)'s exemption for waivered activities to the separate affiliate requirement. Subsection 272(a)(2)(B) applies to "interLATA telecommunications services". Waivered interLATA information services are a subset of waivered "interLATA telecommunications services" and are, therefore covered by the grandfathering set forth in Section 272(a)(2)(B)(iii). The MFJ had no special rules for interLATA information services as opposed to interLATA services generally.

Congress could not have intended anything other than permanent grandfathering of waivers that allowed interLATA information services to be performed by BOCs. One example is the waiver granted for the BOC provision of "telecommunications devices for the deaf" (TDDs) using a centralized relay mechanism serving several LATAs.[75] Another example is the waiver that allowed the BOCs to provide "enhanced 911" beyond LATA boundaries.[76] The Communications Act recognized that these activities will be performed by the

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75 United States v. Western Elec. Co., No. 82-0192 (D.D.C., Sept. 11, 1989)

76 United States v. Western Elec. Co., No. 82-0192 (D.D.C., Feb. 2, 1989)

BOCs. See section 271(c)(2)(B)(vii)(I) and section 225. These services, by their very nature, could not be efficiently performed outside the BOC.

The Commission asks if section 272(a)(2)(B)(iii)'s exemption from the separate affiliate requirement for previously authorized activities described in section 271(f) is "permanent" in light of section 272(h). Section 272(h) provides for a one year "transition" period for a BOC to come into compliance with the requirements of section 272 for any activity the BOC is engaged in on the date of enactment of the Act.

It is clear that section's 272(a)(2)(B)(iii)'s exemption from the separate affiliate requirement is a permanent exemption. Had Congress intended it to be temporary, it would have said so. Also, there is nothing in the language of the Act which indicates that the three subparts of section 272(a)(2)(B) should be treated differently. Just as the exemption from the separate affiliate requirement for the incidental interLATA services described in subsection (i) and for the out-of-region services described in subsection (ii) are permanent, so is the exemption for the previously authorized activities described in subsection (iii).

The Commission indicates that section 272(h), which gives the BOCs one year to comply with the requirements of section 272 relative to existing activities, applies to waivered activities involving interLATA information services and, therefore, such activities have to be performed in a separate affiliate after one year, even though the waiver did not require a separate affiliate. This interpretation is incorrect. Section 272(h) could not apply to previously authorized activities involving interLATA information services since, as discussed above, section 272(a)(2)(B)(iii) permanently exempts from the separate affiliate requirement all waivered interLATA services, including waivered interLATA information services, which did not include such a separation condition.

In paragraph 37, the Commission notes that section 271(b)(3) states that a BOC, or any BOC affiliate, may provide incidental interLATA services originating in any state immediately after enactment of the 1996 Act. In addition, section 272(a)(2)(B)(i) exempts from the section 272 separate affiliate requirement all of the incidental interLATA services listed in subsection 271(g) except the fourth category (BOC provision of a "store and retrieve" information service). The Commission seeks comment on what, if any, non-accounting structural or non-structural safeguards the Commission should establish that would govern BOC provision of the incidental interLATA services enumerated in section 271(g). At the present time, Ameritech recommends that no additional non-accounting structural or non-structural safeguards be adopted by the Commission.

In paragraph 40, the Commission notes that two pairs of BOCs have proposed to merge their operations (PacTel/SBC and NYNEX/Bell Atlantic). The Commission tentatively concludes that for each of these transactions, the in-region states of the merged entity shall include all of the in-region states of the BOCs involved in the merger. Ameritech does not object to this tentative conclusion. At the present time, Ameritech does not propose that any additional safeguards be established by the Commission governing the conduct of merger partners during the pendency of a proposed merger. Enforcement of the Act's numerous non-discrimination obligations should prevent a BOC's preference for its merger partner to the detriment of other BOCs and unaffiliated entities.

In paragraph 44, the Commission seeks comment on the question of whether an information service such as voice mail should be considered interLATA only when it actually involves an interLATA transmission component or whether such classification results from the mere possibility that the information could be accessed across LATA boundaries. The answer is that for a service to be an interLATA information service, the BOC affiliate must be bundling the provision of an information service with the transmission of the customer's call from the originating LATA to another LATA where the information is stored. If the charge for the interLATA transport is not bundled with the charge for the provision of the information, two services are being provided - interLATA telecommunications service (which must be provided by a separate affiliate) and intraLATA information service (which does not have to be so provided). It is the bundling of the charge for interLATA transport into the charge for the information service that makes the service an interLATA information service. [77]

In paragraph 45, the Commission questions whether the manner in which a BOC structures its provision of an information service affects whether the service is interLATA. The answer to this question is yes. Under the MFJ, a BOC could, and was required to, "structure" an information service as an intraLATA service. The BOCs did this by placing non-transmission computers or live operators in every LATA served by the information service. As a result of this structure, the caller was always obtaining the information from a computer or operator located in the same LATA as the caller. Alternatively, BOCs centralized

[77] See United States v. Western Electric Co., 907 F.2d 160, 163 (D.C. Cir. 1990) ("when information services are... bundled with leased interexchange lines, the activity is covered by the decree").

their databases but permitted their customers to pick and pay for an unaffiliated interexchange carrier to transport calls to the database.

Under the Act, these inefficient methods of operation are no longer compelled. As stated in the Joint Explanatory Statement, the language that became section 271(g)(4) "allows a BOC to engage in interLATA services relevant to the provision of information services from a central computer." Id. at 147.[78] However, the Act does not mandate that the BOC provide information service in this manner. A BOC can still structure an information service as an intraLATA service by having the caller obtain the information sought from a computer or a live operator located in the same LATA as the caller or, in the alternative, centralize the database and permit the caller to select a carrier for the interLATA transmission to the database.

In connection with its discussion of interLATA information services, the Commission references the Bell Atlantic Gateway case[79]. There, the service that was found to be an interLATA information service involved a single processor which served customers in multiple LATAs. Bell Atlantic provided the interLATA transport to the centralized processor bundled with Bell Atlantic's information service. Using the BOC-provided interLATA transport facilities, the customers "interacted" with this central processor. Based upon these facts, the MFJ Court concluded that the service violated the MFJ's interLATA prohibition.

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78 Joint Explanatory Statement, at 147; The House Report on H.R. 1555 similarly noted that the bill "allows a BOC to engage in interLATA services relevant to the provision of information services from a central computer. This would spare the BOC the expense of locating such a computer within each LATA for customer access to information services, such as stock market quotes, sports scores, and voice mail." See Report of House of Representatives on H.R. 1555, 104th Cong, 1st Sess., at 79.

79 United States v. Western Elec. Co., 1989-1 Trade Cases 68,400 (D.D.C. 1989)

Judge Harold Greene explained that if the customer only interacted with the computer that was located in his or her LATA "there would by definition be no interLATA transmission and the Regional Companies could provide the service"[80]. However, he found the service to be impermissible because the customer interacted with the central processor using transport facilities provided by the BOC[81]. This case illustrates that the manner in which the BOC "structures" the information service can be determinative of whether it is an interLATA service.

In paragraph 46, the Commission seeks comment on "whether the fact that a BOC in the past applied for or received an MFJ waiver for the provision of a particular enhanced service presumptively renders that service an interLATA information service subject to the separate affiliate requirements in section 272". The question has implicit in it two assumptions: 1) That an enhanced service is the same as an information service and 2) that an interLATA information service must be provided through a separate affiliate, even when the waiver granted for the provision of the service did not contain a separate subsidiary requirement. Ameritech does not agree with those assumptions. Furthermore, the fact that Ameritech applied for a waiver of an information service does not make the information service interLATA. Prior to 1991, the information services prohibition required a waiver before a BOC could provide an information service, even on an intraLATA basis.

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80 Id. at 60,203 n.13

81 Id. at 60,203,